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Date of Decision: 13th December 1995

CRIMINAL APPEAL NO. 340 OF 1989

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA

and

HONOURABLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may
be allowed to see the judgment? No

2. To be referred to the Reporter or not?
No

3. Whether their Lordships wish to see
the fair copy of judgment? No

4. Whether this case involves a
substantial question of law as to the
interpretation of the Constitution of
India, 1950 or any order made
thereunder? No

5. Whether it is to be circulated to the
Civil Judge? No

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Shri H.M. Chinoy, Advocate, for the Appellant

Shri S.R. Divetia, Addl. Public Prosecutor, for the Respondent

CORAM: A.N. DIVECHA & H.R. SHELAT, JJ.

(Date: 13th December 1995)

ORAL JUDGMENT (per Divecha, J.)

The judgment and order of conviction and sentence passed
by the learned Sessions Judge of Banaskantha at Palanpur in
Sessions Case No. 39 of 1988 is under challenge in this appeal
at the instance of the original accused.

2. It is not necessary to set out in detail the facts giving rise to this appeal. It may be sufficient to note that the then Police Inspector of the Rural Police Station at Deesa, named, Shri S.C. Parmar (the complainant for convenience), was investigating the First Information Report registered in Crime Register No. 154 of 1987 for the offences punishable under sections 454, 457 and 380 of the Indian Penal Code, 1860 (the IPC for brief) on 20th June 1987. In the course of investigation, someone informed him that some person was to come from Vithodar (Rajasthan) for the purpose of selling opium. Thereupon the complainant arranged a watch in the company of several other police officers and officials. Two panch witnesses were also summoned. Around that time the appellant was found coming from Vithodar with something in his hand. He was detained. His name and whereabouts were ascertained. Thereafter his person was searched and from his person was found pills of opium in all weighing 2 Kgs 500 gms. Thereupon the complainant lodged his complaint charging the appellant with the offences punishable under sec. 66A of the Bombay Prohibition Act, 1949 (the Prohibition Act for brief) and sections 17 and 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act for brief). The proceeding arising from that complaint ultimately came to be registered as Sessions Case No. 39 of 1988 in the Court of the Sessions Judge of Banaskantha at Palanpur. On conclusion of the trial, it ultimately came to be culminated into conviction of the present appellant of the offence punishable under sec. 17 of the NDPS Act and sentence of rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default further rigorous imprisonment for 2 years. It may be mentioned at this stage that no charge was framed against the appellant with respect to the offence punishable under the Prohibition Act though the complaint specifically mentioned it. The aggrieved appellant has thereupon invoked the appellate jurisdiction of this court by means of this appeal for questioning the correctness of his conviction and sentence.

3. Since this appeal can be disposed of on one short ground based on the mandatory provisions contained in sec. 42(1) of the NDPS Act, we have not chosen to deal with several rival submissions urged before us with respect to this appeal.

4. The provisions of sec. 42(1) of the NDPS Act are held to be mandatory by the Supreme Court in its binding ruling in the case of State of Punjab v. Balbir Singh reported in AIR 1994 SC 1872. The aforesaid statutory provision requires the officer named therein to reduce to writing any information received from any person inter alia with respect to possession of any narcotic drug or psychotropic substance in respect of an offence punishable under Chapter IV of the NDPS Act has been committed. In para 3 of his cross-examination the complainant

at Ex. 19 has clearly admitted that he had made no noting of the information given by someone regarding some person approaching from Vithodar (Rajasthan) for the purpose of selling opium while the complainant was investigating into the crime mentioned in the complaint at Ex. 20. It thus becomes clear that the mandatory provisions contained in sec. 42(1) in that regard have not been complied with. In view of the aforesaid binding ruling of the Supreme Court, such non-compliance vitiates the trial.

5. In view of our aforesaid discussion, we are of the opinion that the impugned judgment and order of conviction and sentence cannot be sustained in law.

6. In the result, this appeal succeeds. The judgment and order of conviction and sentence passed by the learned Sessions of Banaskantha at Palanpur on 23rd May 1989 in Sessions Case No. 39 of 1988 convicting the appellant of the offence punishable under sec. 17 of the NDPS Act and sentencing him to rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default rigorous imprisonment for 2 years is quashed and set aside. We are told that the appellant has been in jail since the date of his arrest on 20th June 1987. He is ordered to be set at liberty if no longer required in any other case. The muddamal is ordered to be disposed of according to law.
